Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ARCANGELO CIANFARANO,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

JENNIFER L. MCCANN
On the Petition
October 22, 2008

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in ruling that the Appeal was untimely?

2. Whether the Court of Appeals for the Second Circuit erred in ruling that the Court did not have jurisdiction over this case?

3. Whether the Court of Appeals for the Second Circuit erred in ruling that Petitioner failed to establish that the Government breached their agreement?

4. Whether the Court of Appeals for the Second Circuit erred in ruling that the Government did not coerce Mr. Cianfarano into the plea agreement?

5. Whether the Court of Appeals for the Second Circuit erred in ruling that Petitioner's assertion that the District Court erred in refusing to resentence Mr. Cianfarano was without merit?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

CONCISE STATEMENT OF THE CASE 7

SUMMARY OF ARGUMENT 10

REASONS FOR GRANTING THE PETITION .. 12

I. DEFENDANT-APPELLANT WAS NOT UNTIMELY WITH HIS NOTICE OF APPEAL, THUS THE CIRCUIT COURT HAD JURISDICTION 12

II. THE SECOND CIRCUIT COURT INCORRECTLY FAILED TO FIND THAT THE DISTRICT COURT ERRED IN REFUSING TO RESENTENCE THE PETITIONER 14

III. THE CIRCUIT COURT WAS ERRONEOUS WHEN IT DID NOT FIND THAT THE GOVERNMENT VIOLATED THE TERMS OF PETITIONER'S PLEA AGREEMENT 16

IV. THE CIRCUIT COURT ERRED IN FINDING THAT ARCANGELO CIANFARANO WAS NOT COERCED INTO PLEADING GUILTY 17

CONCLUSION 21

APPENDICES 1a

Judgment of Conviction in the United States District Court, Eastern District of New York dated October 6, 2006 ..... 1a

Summary Order of the United States Court of Appeals for the Second Circuit dated May 21, 2008 ..... 3a

Order of the United States Court of Appeals for the Second Circuit dated July 25, 2008 ..... 8a

TABLE OF AUTHORITIES

CASES PAGE

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971) 10, 13-15

Serfass v. United States, 420 U.S. 377 (1975) 14

United States v. Broce, 488 U.S. 563 (1989) 14

United States v. Brody, 808 F.2d 944 (2d Cir., 1986) 15

United States v. Frias, 2008 U.S. App. LEXIS 6777 (2d Cir., 2008) 12

United States v. Parker, 874 F.2d 174 (3d Cir. 1989) 14

United States v. Rammelkamp, 270 Fed.Appx. 35, (2nd Cir., 2008) 18

United States v. Rosa, 123 F. 3d 94, 97 (2d Cir. 1997), ... 12

STATUTES

Fed. R. App. P. 4(b) 1, 12, 14

18 U.S.C. §1349 4

28 U.S.C. §2255. ..... 4, 13, 14

OPINIONS BELOW

The judgment and opinion of the Court Of Appeals, Second Circuit, was issued in a summary order filed on May 21, 2008. Rehearing was denied on July 25, 2008.

JURISDICTION

Subject matter jurisdiction of the United States District Court for the Eastern District of New York was conferred pursuant to 18 *U.S.C.* § 1349 in Suffolk County, New York, which is part of the Eastern District of New York.

Appellate jurisdiction was conferred on the United States Court of Appeals for the Second Circuit pursuant to Title 18 *U.S.C.* §3742(a)(1).

Pursuant to 28 *U.S.C.* §2101 and Rule 13 of this Court, this petition for a Writ of Certiorari was filed within ninety (90) days after entry of the order denying discretionary review. The statutory provision believed to confer jurisdiction on this Court to review this Writ of Certiorari is 28 *U.S.C.* §1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. App. P. 4(b). **Appeal in a Criminal Case.**

"(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within

10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment.

A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or
(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or
(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time.

Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure

35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined.

A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket."

18 U.S.C. §1349: **Attempt and conspiracy**

"Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

28 U.S.C. §2255. **Federal custody; remedies on motion attacking sentence**

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of

(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

CONCISE STATEMENT OF THE CASE

In June, 2002, the Suffolk County District Attorney's Office executed a search warrant at D&A Auto Collision, Inc., in Huntington, New York in its investigation of State insurance fraud. D&A Auto Collision, Inc. (hereinafter "D&A") was owned by Angelo Cianfarano, the Petitioner, and Dean Poupis. During the execution of that warrant, bank accounts and approximately one hundred seventeen thousand ($117,000.00) dollars from a safe located within D&A were seized. These funds totally approximately $200,000.00 were jointly owned by Angelo Cianfarano and Dean Poupis. The District Attorney's Office claimed that the funds and property seized were the product of illegal activity and, consequently, they were the subject of forfeiture. (The forfeiture proceeding was eventually dismissed.)

Mr. Cianfarano pled not guilty to the criminal charges and commenced "cooperating" with the District Attorney, even testifying without immunity in the State Grand Jury. Although Mr. Cianfarano was offered immunity, he declined to accept it so that he would be a more compelling witness for State

prosecutors. In return for his extensive cooperation, Mr. Cianfarano was told that the State charges against him would be dismissed. The Petitioner was further instructed that he would receive a full credit against any taxes owed by him from the funds that were seized. Mr. Cianfarano was told that he would be allowed to remain in business. Mostly importantly, he was promised by State authorities that they would not make a referral to federal prosecutors, that the federal government had no interest in the case and that there would not be a federal prosecution.

Former federal prosecutor Leonard Lato, Esq. left the United States Attorney's Office to work for Thomas Spota, the then newly elected District Attorney of Suffolk County. The petitioner previously believed that it was Mr. Spota, who was dissatisfied with the plea bargain that had been worked out for Mr. Cianfarano. However, during oral argument in the United States Court of Appeals for the Second Circuit, Respondent's counsel revealed that it was actually Mr. Lato, the former federal prosecutor, who disapproved of Mr. Cianfarano's deal. Mr. Norling, Respondent's counsel, stated on the record that Mr. Lato had "genuine concerns about bringing the case in Suffolk County." Those concerns included the fact that Mr. Cianfarano entered into proffer and "cooperation agreements" with the Office of the District Attorney of the County of Suffolk on November 15, 2002 and Mr. Cianfarano could not be prosecuted for any more state charges related to these acts. The matter was referred to the United States Attorney's Office whereupon the federal government then became involved. The Federal Government never produced a Petite Policy

memorandum authorizing the dual sovereignty.

In the Fall of 2004, Assistant United States Attorney Geoffrey Kaiser was assigned to the federal case. Mr. Kaiser made it clear that he was not interested in Mr. Cianfarano's "cooperation" in any federal case since the Petitioner had already done so with State authorities. Rather, Mr. Kaiser indicated that Mr. Cianfarano's good faith cooperation with the State authorities would be the very basis of his Federal prosecution as the Government planned to introduce Mr. Cianfarano's State Grand Jury testimony at his Federal trial. Mr. Cianfarano was also told that he would face new and additional State criminal charges if he did not accept the Federal deal.

With his State Grand Jury testimony firmly in the grip of Mr. Kaiser, Mr. Cianfarano had no realistic option but to plead guilty to one count of attempt or conspiracy to commit mail fraud on May 25, 2006. On September 22, 2006 and October 6, 2006, the Hon. Arthur D. Spatt, United States District Court Judge for the Eastern District of New York sentenced Mr. Cianfarano to eight months in jail. In early December, 2006, Mr. Cianfarano learned that the Government had breached their promises to allocate the seized funds to the IRS towards the payment of Mr. Cianfarano's taxes. Mr. Cianfarano would not be receiving the benefit of his plea agreement. On December 22, 2006, Judge Spatt signed an Order to Show Cause returnable on December 28, 2006, which sought the Court to vacate the defendant's sentence and order a re-sentencing of the defendant and grant a stay of sentence pending the determination of the motion. On January 4, 2007, Mr.

Cianfarano filed his notice of appeal.

On May 13, 2008, the Court of Appeals Panel of Judges assigned to this matter, Hon. Roger J. Miner and Hon. Barrington D. Parker heard oral argument on this matter. By Summary Order on May 21, 2008 (copy annexed hereto), the Court of Appeals made the following erroneous determinations: that the Appeal was untimely; that the Court does not have jurisdiction over this case; that the Government did not breach their agreement with Mr. Cianfarano; that the Government did not coerce Mr. Cianfarano into the plea agreement; that the District Court did not err in refusing to resentence Mr. Cianfarano. Mr. Cianfarano timely filed a petition for panel rehearing or, in the alternative, for rehearing *en banc*. By Order on July 25, 2008, the Court denied Petitioner's application.

SUMMARY OF ARGUMENT

The Circuit Court's denial of Petitioner's appeal was erroneous because the Court had jurisdiction and the appeal was filed timely. The Court also erred in upholding Judge Spatt's refusal to grant a resentencing hearing for the Petitioner.

The Government has asserted that Mr. Cianfarano should have filed his appeal within ten days of the original sentencing date, October 6, 2006. However, as Mr. Cianfarano did not learn of the Government's breach of the agreement until December, 2006, it would have been impossible for Mr. Cianfarano to have grounds on which to appeal as Mr. Cianfarano

was bound from appealing as long as the plea agreement was valid. If Mr. Cianfarano had appealed in October, 2006, he would have been in breach of the plea agreement and lost the benefit of the contract himself. In fact, it was not until the United States Attorney's admission on the record December 28, 2006 that even the Northfork Funds had not been credited to Mr. Cianfarano that he was positive the contract had been breached, freeing him to file an appeal.

Under *Santobello v. N.Y.*, 404 U.S. 257, (1971), the Petitioner was entitled to the benefit of that contract. The Government's failure to convey that benefit was illegal and invoked the protections of 28 U.S.C. § 2255 for Mr. Cianfarano. On December 28, 2006, Judge Spatt considered the Order to Show Cause requesting that he vacate conviction, order resentencing, and grant a stay of sentence until the conclusion of the appeal. Judge Spatt denied the first two applications and entered an order for the third application, thereby effectively preserving the issue with his order. A timely Notice of Appeal was properly filed pursuant to Rule 3 of the Federal Rules of Appellate Procedure. The appeal was filed timely on January 4, 2007, just seven days after the denial of resentencing by Judge Spatt. A timely Notice of Appeal was properly filed pursuant to Rule 3 of the Federal Rules of Appellate Procedure. The Second Circuit erred in rejecting Petitioner's argument that Judge Spatt should have granted a re-sentencing hearing on that date.

REASONS FOR GRANTING THE PETITION

I. DEFENDANT-APPELLANT WAS NOT UNTIMELY WITH HIS NOTICE OF APPEAL, THUS THE CIRCUIT COURT HAD JURISDICTION

The Circuit Court's decision of May 21, 2008, indicates that Fed. R. App. P. 4(b) is not jurisdictional because it was not created by statutory mandate of the United States Congress. Although Rule 4(b) is not jurisdictional, governmental objection to the untimeliness of a criminal defendant's appeal renders Rule 4(b) mandatory. See *United States v. Frias*, 2008 U.S. App. LEXIS 6777 (2d Cir., 2008). Rule 4(b) requires that a defendant file Notice of Appeal from a conviction or final judgment within ten days of entry of the order. Mr. Cianfarano did file his Notice of Appeal within ten days of entry of the order from which he was appealing.

The Second Circuit misinterpreted the facts of this matter, but their decision was quite correct in citing *United States v. Rosa*, 123 F. 3d 94, 97 (2d Cir. 1997), stating that, " '[A] defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed guidelines range is enforceable. . . . [I]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement,'(internal citations and quotation marks omitted)." However, Arcangelo Cianfarano did not secure the benefits of the plea

agreement, and as such, he should be allowed to appeal the merits of the sentence conforming to the agreement.

The Petitioner had funds ($77,000.00) seized during the Suffolk County execution of the search warrant. Those funds were supposed to be credited towards paying Mr. Cianfarano's taxes to the IRS. Suffolk County released those funds to the Federal government, who in turn credited them to his former business partner, Dean Poupis. Mr. Cianfarano did not learn of the breach until two months after his sentence. Not only did he not receive the benefit of his agreement with the United States government, but he also did not enter the plea agreement knowingly because he was not advised that the government would be crediting his funds towards Dean Poupis instead. In failing to credit Mr. Cianfarano with payment of his taxes, the federal government breached their agreement with the Petitioner, violated his Constitutional rights, and invoked Mr. Cianfarano's right to protection under 28 U.S.C. § 2255.

The United States government breached their agreements with the Petitioner, and acted *in pari delicto* in doing so, this Court must recognize that this appeal was not possible until the defense became aware of the breach and the government's misconduct. See *Santobello v. N.Y.*, 404 U.S. 257, 92 S.Ct. 495 (1971). Petitioner's counsel filed an Order to Show Cause on behalf of Mr. Cianfarano as soon as the breach was discovered. Judge Spatt signed the Order, but erroneously denied the application for a resentencing hearing. It is from that violation that the defendant timely filed his Notice of Appeal seven days later. As

the Notice of Appeal was timely filed, the United States Court of Appeals for the Second Circuit had jurisdiction over the matter and was not precluded from deciding the case pursuant to Rule 4(b).

II. THE SECOND CIRCUIT COURT INCORRECTLY FAILED TO FIND THAT THE DISTRICT COURT ERRED IN REFUSING TO RESENTENCE THE PETITIONER

The Petitioner had a right to a resentencing hearing under 28 U.S.C. § 2255 because his sentence was imposed in violation of the laws of the United States and was filed within one year of conviction. Under *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971), the Petitioner had a legally enforceable right to the benefit for which he plea bargained as the agreement is a contract and enforceable as such. A guilty plea is akin to an admission of the facts alleged in the indictment, thereby estopping a defendant from relitigating the facts that establish the elements of the offense charged. *United States v. Broce*, 488 U.S. 563, 569 (1989). By pleading guilty, the defendant admits all of the elements of the charged crime. *United States v. Parker*, 874 F.2d 174, 177-78 (3d Cir. 1989). Therefore, when a defendant admits his guilt to all of the elements of the charged crime, he has, in fact, plead guilty, because in a criminal proceeding, double jeopardy attachment occurs when the defendant faces the risk of a determination of guilt. See, *Serfass v. United States*, 420 U.S. 377, 391-92 (1975). Any government promise that is detrimentally relied upon when a defendant enters a plea of guilty, is binding

upon the government. In *Santobello*, the Supreme Court stated, "the remedy for the state's breach of a plea agreement is either to enforce the bargain made or to allow the defendant to withdraw his guilty plea." *Santobello*, at 263. Where a breach of the agreement touches the essence of the plea agreement, specific performance in the form of resentencing is appropriate. *United States v. Brody*, 808 F.2d 944, 948 (2d. Cir., 1986). Therefore, because the United States disregarded the law as established by *Santobello* in violating the terms of the plea agreement, Mr. Cianfarano should have been afforded a hearing on resentencing.

The Petitioner also had a right to a hearing on the issue of resentencing under 28 U.S.C. § 2255 because his sentence was imposed in violation of the Constitution. Mr. Cianfarano respects and abides by his legal obligation to pay his federal taxes as determined by the Internal Revenue Service. However, by usurping the Petitioner's funds in the amount of $77,000.00, which were supposed to pay his federal taxes, the United States government has unfairly and disproportionately taxed Mr. Cianfarano twice for the same amount. The amount of federal taxes that an individual pays is approved by the United States Congress. By refusing to credit Mr. Cianfarano with paying the IRS and by making him pay his taxes twice, the Petitioner has been subject to duplicative taxation without representation in violation of his Constitutional rights because he has been taxed outside the perimeters established by Constitution under Article 1, Section 2, Clause 3 and the Sixteenth Amendment.

III. THE CIRCUIT COURT WAS ERRONEOUS WHEN IT DID NOT FIND THAT THE GOVERNMENT VIOLATED THE TERMS OF PETITIONER'S PLEA AGREEMENT

It is respectfully submitted that the Circuit Court erred in finding the Government's failure to credit Mr. Cianfarano with seized funds was not a breach of his plea agreement. Not only were the seized funds in the amount of $77,000.00 from the Fleet accounts erroneously credited to Mr. Poupis, but the funds in the Northfork bank accounts were also not credited to Mr. Cianfarano. Due to Suffolk County's agreement with regard to the Fleet funds, no additional agreement to the allocation of those funds should have been necessary to secure that credit for Arcangelo Cianfarano because those funds were already allocated to pay his taxes. However, even the funds in the two Northfork bank accounts specifically enumerated within the written plea agreement and orally conveyed at sentencing were ever credited to Mr. Cianfarano either.

While the Government has tried to misdirect the Court's attention with inaccurate arguments that the Fleet funds were *ultra vires*, it has still not answered to the whereabouts of the Northfork bank accounts. No credit has been given to Mr. Cianfarano for the funds in those accounts in direct violation of the plea agreement. The Second Circuit does not address this direct disregard for the terms of the plea agreement in its decision. However, they should have.

Failing to grant Mr. Cianfarano credit for those Northfork funds specially written in the plea

agreement, as well as the Fleet funds predestined for the IRS, is direct evidence that Mr. Cianfarano has not received the benefit of his plea bargain.

IV. THE CIRCUIT COURT ERRED IN FINDING THAT ARCANGELO CIANFARANO WAS NOT COERCED INTO PLEADING GUILTY

The federal government has enacted tremendous laws that federally criminalize many actions already made illegal by state penal codes. Local and state authorities have had their powers usurped by the federal prosecution of criminals by the United States Government. When the states attempt to prosecute a criminal who has already been convicted federally, they are bound by double jeopardy and precluded from invoking their individual penal codes and systems of justice to deal with local criminals. However, when the states have prosecuted a criminal first, the federal government can step into the picture without fear of invoking a defendant's very same Fifth Amendment protections. This inadequacy not only destroys the core foundation of double jeopardy in this country, it also destroys our federalist system by taking away the prosecutorial function from the state.

The United States Attorney's Office has attempted to address this issue internally by means of the Petit Policy. Unfortunately, that Policy has not been enforced and is frequently ignored by overzealous prosecutors who see state level admissions of guilt as an easy means of increasing federal conviction rates.

It is not unlike shooting fish in a barrel. The state prosecutor has done all the work, convicted the defendant by trial or plea agreement, and the defendant puts his guilty allocution on the record during plea or sentence in hopes that the admission of guilt will benefit his sentence. Federal prosecutors need only invoke the interstate commerce clause to turn a local crime into a national issue.

This progression of federal prosecution is seemingly limitless without judicial intervention or judicial enforcement of the Petit Policy. Armed robbery becomes a federal case because United States currency was stolen. Burglary becomes a federal case when a defendant steals a television that was manufactured in China. Grand Theft Auto becomes a federal case if a car is stolen in New York, but was assembled in Michigan. Arson becomes a federal case when the materials used to construct the burn-down building were delivered across state lines from Tennessee to New York. See *United States v. Rammelkamp*, 270 Fed.Appx. 35, (2nd Cir., 2008), (Cert. denied, 2008).

This abuse of federal prosecution powers has not just restricted states' rights; it has detrimentally impacted the Petitioner. By adopting dual prosecution for singular offenses with blatant disregard for protections against Double Jeopardy, state and federal authorities have found a mutually beneficial way to force defendants into plea agreements.

In New York State, grand jury witnesses receive transactional immunity for their testimony. Thereby,

the witnesses cannot be prosecuted in state or federal court based upon what they admit on the stand. However, a witness for the prosecution can be easily impeached by his own admission of receiving immunity for his testimony in a grand jury or trial. An immune witness is less believable to a grand jury than someone who has signed a waiver of immunity because the grand jury believes that they are testifying voluntarily without receiving any advantage as a result of their testimony. As such, many state prosecutors promise informal immunity deals to witnesses without calling it immunity and without following the procedures established in state and federal court to grant a witness formal immunity, leaving the witness open to substantial risk. This *de facto* immunity is false inducement to testify and to surrender one's Fifth Amendment Right against self-incrimination.

Angelo Cianfarano is the victim of a breached informal immunity contract. Mr. Cianfarano was told by state prosecutors that, if he testified in front of the Grand Jury without immunity, he would not be prosecuted In reality, the prosecution was actually offering Mr. Cianfarano *de facto* transactional immunity without having to worry that Mr. Cianfarano would be impeached on the stand by his inducement to testify. Suffolk County received the benefit of the agreement when Mr. Cianfarano's testimony and cooperation resulted in the indictment and conviction of Dean Poupis.

Rather than be rewarded for his commitment to changing his life and helping the government prevent further crimes, Mr. Cianfarano's Grand Jury testimony

was given to the federal government. Then, the state prosecutors, the very people who coerced him into testifying so that they could get the Poupis indictment, turned on him. The very existence of his *de facto* immunity was denied. The state prosecutors said that if he did not take the federal plea bargain offered to him, they would use his grand jury testimony against him in state court.

The state prosecutors caused Angelo Cianfarano to give up his Constitutional right against self-incrimination through lies, false inducement, and deceit. This government practice should not be allowed to stand. Prosecutors should not be allowed to benefit from their own breach of ethics. Even if a plea agreement is not formal, a prosecutor should not fail to comply with the terms of a bargained-for plea agreement, unless the defendant breaches the terms of that plea agreement. Mr. Cianfarano did not breach his end of the deal. He more than complied with his portion of the bargain. The prosecution should either be bound by *de facto* immunity that they promised, or the very promise of informal immunity should be deemed illegal so that future prosecutors cannot prey upon naive witnesses.

This unethical behavior by the state and federal authorities resulted in Mr. Cianfarano being coerced into pleading guilty in federal court. But for the possibility of dual prosecution and the government's bad faith, Mr. Cianfarano would not have been forced to plead guilty because there would have been no grand jury testimony and no fear of additional state prosecution based upon that testimony.

CONCLUSION

It is respectfully submitted that this Court grant *certiorari* and reverse the judgment of the Second Circuit because it is clear that the Second Circuit Court of Appeals erred in its ruling that the appeal was not timely followed and that it did not have jurisdiction. In addition, the Court should grant the Petitioner's prayer for a *writ of certiorari* and reverse the judgment of the Second Circuit because the Court should have found that the United States breached its agreement with Arcangelo Cianfarano and the Petitioner should have been granted a re-sentencing hearing.

Respectfully submitted,

THOMAS F. LIOTTI
Counsel of Record

On the Petition:
Jennifer L. McCann, Esq.
October 22, 2008

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

ARCANGELO CIANFARANO

Case Number CR-06-0322-01

JUDGMENT IN A CRIMINAL CASE

The Defendant Pleaded Guilty to count one of a single count information.

The Defendant is adjudicated guilty of these offenses: 18 *U.S.C.* 1341 and 1349, Conspiracy to Commit Mail Fraud, a Class C Felony.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Date of Imposition of Judgment: October 5, 2006.

ARTHUR D. SPATT
UNITED STATES DISTRICT JUDGE
DATE: October 18, 2006

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of EIGHT (8) MONTHS.

The defendant shall surrender to the custody of the United States Marshal.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of May, two thousand and eight.

Present: HON. ROGER J. MINER
HON. BARRINGTON D. PARKER
Circuit Judges[1]

----------X

United States of America,

Appellee,

-against-

Arcangelo Cianfarano,

Defendant-Appellant.

----------X

SUMMARY ORDER

No 07-0108-cr

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[1] The Honorable Wilfred Feinberg, originally a member of the panel, recused himself, and the appeal is being decided, pursuant to 2d Cir. Local Rule §0.14(b), by the remaining members of the panel who are in agreement.

For *defendant-appellant*:: Thomas F. Liotti (Jennifer L. McCann, *on the brief*), Law Offices of Thomas F. Liotti, Garden City, NY.

For *appellee* : Peter A. Norling (Geoffrey R. Kaiser, on the brief), Assistant United States Attorneys for Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the appeal is DISMISSSED.

Defendant-Appellant Arcangelo Cianfarano appeals from a judgment of the United States District Court for the Eastern District of New York (Spatt, J.). We assume the parties' familiarity with the underlying facts and the procedural history of the case, as well as the issues on appeal. On May 25, 2006, Cianfarano pled guilty to a single count of mail fraud. The district court sentenced him principally to eight months incarceration on October 6, 2006. On December 22, 2006, Cianfarano filed an "application for re-sentencing" in which he sought a non-incarceratory sentence because the government allegedly breached its plea agreement. The district court held a hearing on December 28, 2006, and rejected Cianfarano's application. Cianfarano filed a notice of appeal on January 4, 2007.

Cianfarano was sentenced on October 6, 2006 and the judgment of conviction was entered on November 7, 2007. Under Fed. R. App. P. 4(b)(1)(A)(i) a defendant has 10 days, excluding holidays and weekends, from entry of judgment on the docket in which to file a notice of appeal. Cianfarano filed his appeal on January 4, 2007, well after the deadline. He asserts, with no precedential support, that the December 28, 2007 date of the denial of his "application for resentencing," as opposed to the entry of judgment, should start the clock for his appeal. While "Rule 4(b) is not jurisdictional," "[w]hen the government properly objects to the untimeliness of a defendant's criminal appeal, Rule 4(b) is mandatory and inflexible." United *States v. Frias*, No. 06-5381-cr, 2008 U.S. App. LEXIS 6777, at * 11 (2d Cir. Mar. 31, 2008). Therefore, we reject his appeal as untimely.

Even if Cianfarano had filed in a timely manner, however, his appeal would fail. Cianfarano advances a number of arguments in his brief, but all of them, save those that allege a breach of his plea agreement, were waived by the agreement. In that agreement, Cianfarano agreed not to appeal or otherwise challenge his conviction or sentence in the event that the district court sentenced him to a prison term of 33 months or below. The district court sentenced Cianfarano to only eight months incarceration, thus triggering the "no appeal" clause of the agreement, which we now enforce. See *United States v. Rosa*, 123 F.3d 94, 97 (2d Cir. 1997) ("[A] defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed guideline range is enforceable . . . [I]n no circumstance . . . may a defendant, who has secured

the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement." (Internal citations and quotation marks omitted)).

Cianfarano's claims that the government coerced him into entering into a plea agreement and then violated the agreement have no merit. His coercion claim stems from his belief that the prosecutors should not have been able to threaten him with state prosecution or use his state grand jury testimony against him when negotiating his plea deal. The fact that overwhelming evidence exists and that a defendant faces potential state charges means that accepting a plea agreement may be prudent. It does not mean, however, that the plea agreement is coerced or involuntary.

It has not been established that the government violated the plea agreement. Cianfarano claims, among other things, that the government violated the plea agreement when it used $117,000 in cash it confiscated from the body shop business and funds in two Fleet Bank accounts to satisfy the tax obligations of one of his co-conspirators. Regardless of the merits of Cianfarano's complaint, which we do not reach, this transaction cannot violate his plea agreement, which only mentions two North Fork bank accounts, the contents of which Cianfarano agreed would "be paid directly to the Clerk of the Court . . . to be used to pay any restitution . . . and any federal income tax liability that is determined to exist." The $117,000 in cash and the two Fleet Bank accounts lie outside the purview of

the agreement and are not mentioned therein. Furthermore, the agreement expressly provides that it contains all promises made to Cianfarano, that it supersedes all previous promises, and that all future promises must be memorialized in writing. Therefore, the disposal of funds not covered or mentioned by the plea agreement does not violate the agreement. We have considered Cianfarano's other arguments and find them without merit.

For the foregoing reasons, the appeal is DISMISSED for lack of jurisdiction.

FOR THE COURT

Catherine O'Hagan Wolfe,
Clerk of the Court

By:_____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of July, two thousand and eight.

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United States of America,

Appellee,

ORDER

-against-

No 07-0108-cr

Arcangelo Cianfarano,

Defendant-Appellant.

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Appellant Arcangelo Cianfarano having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court
Catherine O'Hagan Wolfe, Clerk

By:_____
Frank Perez, Deputy Clerk